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Insurance Industry Aids Brownfields Redevelopment

Two major obstacles common in brownfields redevelopment projects are a lack of available funds to begin an environmental cleanup and a fear of unknown costs once a cleanup has begun. One way for state and local governments to address the problem of lack of funding is to utilize old Comprehensive General Liability (CGL) insurance policies or environmental insurance policies of the companies that caused the contamination, even if the contamination occurred long ago. Indiana laws are particularly advantageous to recover costs through old policies. Additionally, to address the problem of uncertainty associated with environmental remediation, insurance companies have developed new environmental insurance products that transfer the liability risk from the lender/borrower to the policy. This article examines how the use of each type of insurance product can benefit brownfields redevelopment.

Recovering Cleanup Costs Through Historical CGL Policies

Many businesses operating since the early 1900s obtained CGL policies. These policies were not specifically environmental insurance policies; they were intended to provide a broad range of general coverage, with the exception of certain exclusions. These policies are known as "long tail" policies. While they cover property damage that took place during the policy period, a claim for damages can be brought after the expiration of the policy. Courts have held that environmental contamination is considered a type of property damage that is covered by these old CGL policies. In addition, property damage that was continuous through several policy periods can be covered by all the insurance policies in effect during those periods. Therefore, multiple insurance policies from each of the potentially responsible parties (PRP) that caused the contamination can often be used to obtain significant amounts of money to clean up brownfield sites.

Recovering Cleanup Costs Through Environmental Insurance Policies

Businesses that caused contamination may have also held

insurance policies that were specifically designed for environmental damages. These policies can also potentially be used to recover costs when remediating a brownfields site.

In general, environmental insurance may be divided into four categories of coverage:

1. Owners/Operators Liability, where insurance is available to the contractors and companies working on site, whether doing business or engaged in cleanups.
2. Pollution Legal Liability (PLL) or Environmental Impairment Liability, where insurance covers errors in managing contamination, such as a third party claim for losses caused by pollution, including a release, discharge or escape of the pollutant into the land, water, or air.
3. Re-opener or Regulatory Action, where coverage insures against the reopening of a previously approved cleanup. This coverage usually applies to older sites.

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4. Cost-Caps or Stop-Loss, where policies set a limit on the costs of cleanup.

Many companies whose operations had the potential to pollute the environment bought PLL insurance. The majority of these policies are based on CGL policies, in that payment is received for damages due to bodily injury or property damage if the damages or cleanup costs were incurred because of the pollution condition. Owners/operators, generators, and even transporters to or from a site bought PLL policies. Like the historical CGL policies, any environmental insurance policy that was held while the company was in operation then could be applied to losses for cleanup costs, in many cases even after the

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Insurance *(continued from cover page)*

company is bankrupt or abandoned. As a hypothetical example, if a municipality were to buy an abandoned factory to reuse the infrastructure and surrounding property for a consumer mall, the municipality could then litigate for cleanup under the PRP's old policies that were in place before the purchase.

Using such CGL and/or environmental policies allows for the cleanup of abandoned sites in a manner that is not cost prohibitive. Decades of coverage could be available for such brownfield redevelopment efforts. There are several ways that one could recover such insurance policies. Law firms and environmental consultants are often available to litigate and investigate insurance claims on a contingent basis at little cost to municipalities or other stakeholders.

Knowing how to utilize past insurance policies for current cleanup costs can be a useful tool to those wishing to redevelop brownfields, especially governmental entities. Still, how does a potential buyer feel more secure about purchasing a brownfield property? In addition, how can a lender's reservations be addressed? Indiana has developed tools such as the Voluntary Remediation Program and Comfort and Site Status Letters to deal with liability. Additionally, the insurance industry has recognized that insurance policies may similarly be useful in limiting the liability associated with property transactions involving brownfields.

New Approaches to Policies for Current and Future Liabilities

Today, insurance agencies are realizing that many parties are involved in property transfers, including potentially responsible parties, lenders, contractors, and brownfield developers. These parties are more concerned than ever about the risks of owning or operating a property that might involve liability for cleanup from historical or ongoing operations. Discovering unknown contamination is not the only problem in site acquisition; the parties must also be concerned about improper remediation procedures that can lead to new contamination or spreading of the contamination, as well as changes in federal and state regulatory requirements regarding cleanup levels and procedures. A revamping of the Pollution Legal Liability policy, as well as new attention to the advantages of Cost-Cap coverage, has aided many deals that otherwise might have failed.

Many PLL policies now break down the insurance agreement to not only potential pollutant conditions and third party claims, but also pre-existing conditions, and many now distinguish between on-site and off-site cleanup. The value for the prospective brownfield buyers and developers is that the policies address known pollution issues to help control the costs. Voluntary cleanup costs are now covered, and the policy can be for more than one site, with a duration of up to 10 years.

Perhaps the most impressive change in liability insurance is the merging of all four categories of insurance to help investors protect themselves against cost overruns. For example, a Cost-Cap coverage or a Stop-Loss policy works with PLL policy by solving the dilemma of dealing with the unknown and known pollution at a site. The coverage considers all current claims and cleanups ordered, as well as past costs, even insuring against cleanup cost overruns—costs that exceed anticipated cost pursuant to a remedial action plan. This policy can cover either on-site or off-site contamination. The Cost-Cap policy also can cover the insured if new contamination is found during remediation. Overall, any combination of insurance policies can enhance the property value itself. Because brownfields may only be perceived as having an environmental threat, with many sites having little or no contamination, insurance costs may be obtained at low rates.

Insurance coverage is a valuable tool, particularly for municipalities who want to promote reuse and redevelopment of potentially contaminated sites. For example, a local government entity could create a pool of small projects that would be covered under one common environmental insurance policy. This could reduce the effective unit cost for coverage by distributing underwriting costs across more sites, also reducing site assessment costs.

When considering what benefits old and new insurance policies may hold, one should focus on the basic stages of brownfields redevelopment and how insurance coverage could help overcome the barriers of funding needs and liability protection. Issues to think about are how a site will be selected and whether it will involve site assessment activities; whether remediation will be involved; what type of rehabilitation or new construction costs are probable; whether there are any ongoing operations at the site; and finally, if the site will need additional financing. As with any investment, each specific brownfield site will have its own problems and solutions; therefore, reviewing all options with a legal advisor knowledgeable on brownfields redevelopment is recommended.

Insurance is just one more avenue to facilitate brownfields redevelopment. Recovery of old policies can provide funding for remediation. Purchase of new insurance coverage minimizes risks for sellers and buyers, and thus is a valuable liability protection tool.

The information for this article was obtained from the following references:

 *Environmental Insurance for Brownfields Redevelopment: A Feasibility Study*. U.S. Department of Housing and Urban Development, Office of Development and Research. October 1998.

 *California Law Reporter*. "The New Environmental Insurance Products: When does it make sense to buy them?" Susan Neuman. February 1999.

 *Municipalities Learn to Recover Insurance Assets from Damaged Property*. Matthew W. Cockrell and Daniel J. Struck. 1999.

 *Limiting Liability with Insurance*. Presented at the Statewide Brownfields Conference, Indiana 2001: "Local Lessons Learned". Dr. Kristen R. Yount, Northern Kentucky University.

Comfort and Site Status Letters Policy Formalized by IDEM

The IDEM Brownfields Program's Comfort and Site Status Letters Policy was recently adopted by IDEM Commissioner Lori F. Kaplan. The Brownfields Program developed Comfort Letters and Site Status Letters as tools to assist stakeholders in qualifying the risk of environmental liability.

A person or entity considering the purchase or financing of contaminated property faces uncertainty about the liability for remediation of that property under state and federal environmental laws. This fear of incurring liability for cleanup is a barrier to the redevelopment of brownfield properties. While broad environmental laws have assisted governmental entities with cleanup of contaminated sites, IDEM is concerned with the unintended adverse effects of environmental laws on the ability of property owners, operators, prospective purchasers, communities, and other stakeholders to redevelop brownfields. Specifically, IDEM strives to eliminate the fear of liability for those sites that are not contaminated enough to warrant a government cleanup action and for government entities that should not bear the risk of environmental liability, for the ultimate goal of putting brownfields back into productive use.

IDEM has a number of methods of dealing with liability, such as Covenants Not to Sue from participation in the agency's successful Voluntary Remediation Program and no further action letters issued through IDEM's other cleanup programs. Additionally, private methods of dealing with liability, notably insurance policies and indemnification agreements, are often effective in eliminating or mitigating fears about liability. However, IDEM recognizes that a variety of approaches to dealing with liability are necessary to fit the broad range of brownfield transactions and offers the options of Comfort and Site Status Letters.

Comfort Letters may be issued upon request to stakeholders that qualify for an applicable exemption to liability found in Indiana law or IDEM policy. A Comfort Letter applies the law or policy to the stakeholder or the site and states that IDEM does not plan to hold the stakeholder liable for cleanup. The most common liability exemptions cited in Comfort Letters are the various governmental liability exemptions and IDEM's Property Containing Contaminated Aquifers Policy, which states, in part, that a property owner will not be held liable for contamination that migrates onto the property from an off-site source. While the liability protection offered by Comfort Letters is less than that of the Voluntary Remediation Program's Covenant Not To Sue, which is a release of liability, these letters still

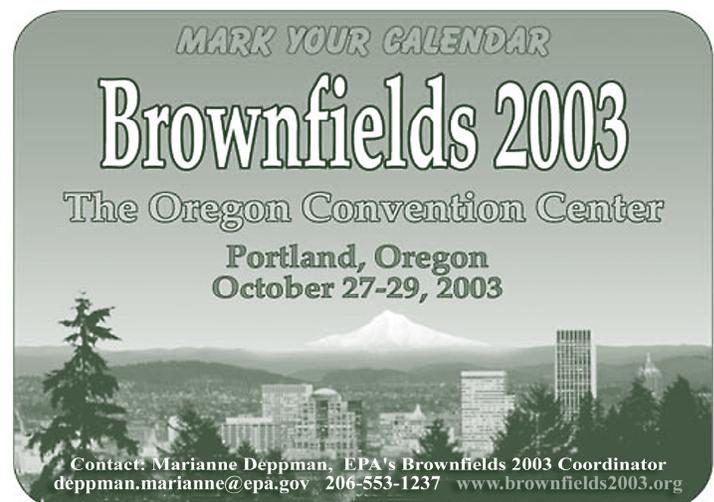
provide a reasonable assurance that the stakeholder will not be held liable for cleanup of contamination.

Site Status Letters may be issued when it can be demonstrated to IDEM's satisfaction that the current levels of contaminants at the brownfield substantially meet current cleanup criteria as established by IDEM. While the stakeholder may still officially be liable for cleanup, the Site Status Letter explains that current site conditions do not present a threat to human health or the environment and that IDEM does not plan to take a response action at the brownfield.

Comfort and Site Status Letters are useful in that they may be issued relatively quickly (usually within 60 days of a request), require less technical documentation than other methods of dealing with liability, and are free of charge. Comfort and Site Status Letters therefore provide alternative ways of facilitating the transfer and redevelopment of brownfield properties.

The Brownfields Program's Comfort and Site Status Letters Policy is intended to eliminate unnecessary barriers to the transfer and redevelopment of brownfields, while maintaining the quality of the state's environment. In recognition that the perception of environmental contamination on a property imposes a transaction cost upon the transfer of that property, this policy sets guidelines for IDEM to consider when deciding to issue Comfort and Site Status Letters.

The Comfort and Site Status Letters policy can be viewed on the Brownfields Program Web site.



Rural Communities Turn to RCAP for Assistance



The Indiana Rural Community Assistance Program (RCAP) has been providing technical assistance to rural communities since 1981. When many Indiana rural communities need help with sewer, water, and solid waste issues, they turn to RCAP and its team of technical assistance providers. RCAP can provide free assistance to low-income communities under 10,000 in population facing tough decisions about local infrastructure. While RCAP is

restricted to helping communities with a population under 10,000, a typical RCAP-assisted community has a population of fewer than 1,000. RCAP can assist communities during all steps of a project, including project development and public education, procuring engineering services, securing funding, and more.

In addition to the many other types of solid waste assistance, RCAP staff can aid communities with brownfields evaluation and redevelopment. For example, RCAP is working with a central Indiana community that requested help to clean up an abandoned, illegal dumpsite to create a public park. RCAP, IDEM's Office of Land Quality, and the U.S. EPA Region V Brownfields Program are working together to assess the property and determine the level of contamination. Once the assessment is completed, RCAP will work with the community to determine the next steps towards converting this local liability into a community asset.

RCAP is a nationwide, non-profit network of technical assistance providers. Because the organization is underwritten by federal and state grants, RCAP is able to offer its services at no charge to the community. For more information on RCAP's free programs and services, call (800) 382-9895.

Final Proposal Submitted for Federal Brownfields Assessment Grant

IDEM has applied for federal brownfields funding from the U.S. Environmental Protection Agency to help Indiana communities redevelop brownfield sites. The Small Business Liability Relief and Brownfields Revitalization Act, which was passed in December of 2001, specified the provision of grants for assessment and cleanup of brownfield sites across the country. Grant awards are competitive, using a two-step selection process. IDEM prepared an initial proposal and submitted it to the U.S. EPA in December 2002 for brownfield assessment grant funds. IDEM was invited in February to prepare a final proposal, which was submitted in March. To view IDEM's grant proposals or the grant proposal fact sheet, please visit the Brownfields Program Web site.



Q How can I subscribe or unsubscribe to the *Brownfields Bulletin*?

A The *Brownfields Bulletin* quarterly newsletter is available on the Brownfields Program Web site, by e-mail, or by U.S. mail. Anyone wanting to subscribe or unsubscribe to/from the *Brownfields Bulletin* may do so by going to the IDEM Web site www.IN.gov/idem/land/brownfields/bulletin/tempunsubscribe.html. Anyone who wishes to receive a paper copy of the bulletin via U.S. mail, or who wishes to discontinue receiving the paper copy of the bulletin can contact Dan Chesterson of the Brownfields Program.



Where Are They Now? Your Brownfield Projects, That Is . . .

In order to help us continue to foster brownfields redevelopment, to evaluate our program, and to highlight success stories, we've added a link to a property profile questionnaire on our Web site. If you have participated in a brownfields project with IDEM's Brownfields Program, please take a moment to fill out this questionnaire as completely as possible and mail or fax it to our office. The questionnaire will provide our program with vital information regarding the current status of your brownfields project. In turn, the information gathered through this process will better enable us to help you in future brownfield redevelopment projects. Thank you for your participation in IDEM's Brownfields Program. We value your input.



February 2003 Indiana Brownfields Site Assessment Grant Round Awards

In March and April, eleven communities (eight small and three large) were awarded Indiana Brownfields Site Assessment Grants available through the Environmental Remediation Revolving Loan Fund (ERRLF). For this round of grants, 20 grant applications (22 sites) were received, with the amount requested totaling over \$520,000, which is over twice the maximum amount available per round; this appears to be the most competitive grant round since inception in 1998. The decision to award funding was a cooperative effort by the Indiana Development Finance Authority (IDFA) and IDEM. The small communities (< 22,000) were awarded a total of \$217,084; and the large communities (> 22, 000) were awarded a total of \$110,345; with a grand total of \$327,429 awarded for grant round 12.

Following is a list of those communities (four of which have previously received state grants)* and sites with their respective grant award amounts:

<u>POLITICAL SUBDIVISION</u>	<u>AMOUNT AWARDED</u>
1) City of Indianapolis (Keystone Enterprise Park)*	\$25,000
2) City of Evansville (Swanson Nunn Electric Co., Inc.)*	\$37,075
3) City of Scottsburg (Former Scott Manufacturing Co.)*	\$43,648
4) City of Auburn (Former Lesser Oil)	\$44,600
5) City of Mt. Vernon (Westside Laundry, Inc.)	\$ 6,350
6) City of Salem (Visual Arts Building & Former Gulf Gas Station)	\$16,131
7) Town of Carlisle (General Motors Auto Dealer & Gas Station)	\$14,977
8) Town of Edinburgh (Auction House)	\$ 29,956
9) City of Greencastle (Old City Hall/Police Station)	\$ 42,165
10) City of Wabash (Denton Site)	\$ 19,257
11) City of South Bend (Studebaker – Area A)*	\$ 48,270

BROWNFIELDS *Score Card* PROGRAM

38

Assessments completed or referred



132

Grants awarded



19

Loans approved



69

Comfort and Site Status Letters issued *



These figures represent the number of services provided upon request since the inception of the Brownfields Program.

*Site Status Letters have been developed to replace No Further Action Letters formerly issued by IDEM's Brownfields Program.

Legislative Update

The following bills were passed in the 2003 Indiana legislative session. Please check the Brownfields Program Web site for more information.

Senate Bill 0207 – Brownfield definition

- Eliminates the condition that a parcel of real estate, to be a brownfield, must be industrial or commercial.
- Provides that the brownfield definition applies in a case where reuse of property is complicated by environmental factors.
- Restates the complicating factors as the presence or potential presence of a hazardous substance, a contaminant, petroleum, or petroleum product that poses a risk to human health and the environment.

House Bill 1714 – Property tax matters

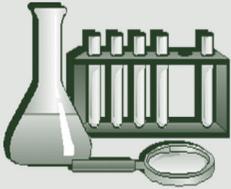
- Makes the voluntary remediation tax credit available to a taxpayer, irrespective of whether the taxpayer is participating in the state Voluntary Remediation Program and irrespective of whether the property is located in a brownfield revitalization zone.
- Consolidates into a single resolution the determinations required of the legislative body to allow the credit.
- Provides that the credit does not apply to the extent that the taxpayer uses state financial assistance for the remediation.
- Allows carryback of a credit to the immediately preceding taxable year.
- Extends the credit for taxable years through 2005.

Land Use Video Seminar Series

The Indiana Land Resources Council will be hosting Land Use Update Seminars for elected and appointed officials and citizens interested in land use in Indiana. These video seminars are free of charge and will be offered at multiple sites throughout the state. The remote video sites include the extension offices of Clinton, Decatur, Hamilton, Harrison, Marion, Marshall, Vanderburgh, and Allen counties, as well as the Purdue University Agriculture Administration Building in Tippecanoe County. Upcoming seminars are scheduled for September 4 and December 4. Two previous seminars were held on March 6 and June 5. The seminar series is endorsed by the Indiana Association of Cities and Towns, the Association of Indiana Counties, and the Indiana Rural Development Council. For more information on the Land Use Update Seminars, contact the Indiana Land Resources Council at (317) 234-5262 or visit www.IN.gov/oca/ilrc/SpringVideoSeries.pdf.

Upcoming Conferences:

- ✓ **Brownfield Redevelopment: Nuts and Bolts for Local Government (July 21-25)**
<http://128.248.232.70/glakes/ce/courseDetail.asp?GID=43>
- ✓ **Orientation to Environmental Assessment (Sept. 22-26)**
<http://128.248.232.70/glakes/ce/courseDetail.asp?GID=116>



Chemical of Concern

Mercury

This article attempts to give only basic information due to limited space. Please consult the appropriate agencies and Web sites or a qualified specialist for more specific/comprehensive information.

Mercury is a naturally occurring element that is present throughout the environment, including plants and animals and may be found at brownfield sites. According to the U.S. EPA's 1997 Mercury Study Report to Congress, coal-fired electric utilities, municipal waste combustion, medical waste incineration, and hazardous waste combustion are common sources of atmospheric mercury emissions. Mercury has been found in at least 714 of 1,467 National Priorities List sites identified by the U.S. Environmental Protection Agency.

There are three forms of mercury — elemental (Hg), inorganic (Hg⁺), and organic (e.g., methyl mercury) that are known to impact human health and the environment. Synonyms for elemental mercury include hydrargyrum, liquid silver, marcelero, mercury, mercury (elemental), quick silver, and rathje. There are many different types of the inorganic mercury form and many different types of the organic mercury form. Releases of mercury to the environment are usually in elemental or inorganic forms. In the atmosphere, mercury is transported by wind either as a vapor (easily released from elemental mercury) or as particles (from combustion processes). When mercury is deposited into the water, microorganisms help convert it to methyl mercury, a highly toxic form of mercury. Methyl mercury bioaccumulates through the food chain and, once in the body, can affect the fetal, juvenile, and adult nervous systems.

Although the United States and many other industrialized countries have substantially reduced mercury uses and releases in recent decades, these reductions are not yet reflected in the air, soil, water,

or mercury concentrations in fish. The decrease can be attributed to a number of actions, including federal bans on mercury additives in paint and pesticides, industry efforts to reduce mercury in batteries, increasing state regulation of mercury emissions and mercury in products, state-mandated recycling programs, and voluntary actions by industry.

The IDEM Mercury Awareness Program (MAP) (www.IN.gov/idem/ctap/mercury/) encourages individuals and organizations to properly dispose of, recycle (when possible), reduce, or eliminate the use of all forms of mercury in products that were or are commercially available. Even a small amount of mercury released from an accidentally broken mercury thermometer can pose an environmental and health hazard and can result in a time consuming, expensive cleanup. Children are particularly attracted to a seemingly harmless, fascinatingly unique, shape-shifting, liquid bead of elemental mercury and are the most vulnerable to the toxic effects of vapor that is known to emanate from elemental mercury.

If a spill occurs, individuals should evacuate the immediate area and ventilate as well as possible. An environmental consultant will need to be contacted for cleanup and disposal. Upholstery and carpeting cannot be effectively decontaminated and require disposal when contaminated.



Products/Wastes Containing Mercury

- Mercury thermometers, sphygmomanometers, barometers, lamps, and light switches.
- Certain foods (e.g., fish).
- Mercury-based pesticides, fungicides, and batteries.
- School laboratory chemicals/equipment.
- Merthiolate or thimerosal (pharmaceuticals).
- Dental amalgam (an unusual chemical form of mercury believed to be safe and non-toxic).



Regulatory Levels/ Requirements

- FDA Maximum Exposure Level:** 1 ppm (part per million) of methyl mercury in seafood.
- EPA Maximum Contaminant Level:** 0.002 mg/l (milligrams/liter) in drinking water.
- EPA No-Effect Level for Air:** 0.3 ug/m³ (micrograms per cubic meter) of mercury vapor in air.
- OSHA:** 0.1 mg/m³ (milligram per cubic meter) of organic mercury in workplace air and 0.05 mg/m³ of metallic mercury vapor for 8-hour shift and 40-hour work week.
- IDEM RISC Guidance Levels:** Default closure levels for residential soil (2.1 ppm) and industrial soil (32 ppm), default closure levels for residential groundwater (0.002 ppm) and industrial groundwater (0.031 ppm).
- ISDH:** Indiana native fish consumption advisories due to mercury and other contaminants.



Possible Means of Exposure to Mercury

- Ingestion:** Elemental mercury is only 0.01% absorbed, but methyl mercury present in some foods is nearly 100% absorbed.
- Inhalation:** Elemental mercury readily gives off an odorless, invisible (in ordinary light) vapor that can be efficiently absorbed via the lungs and skin.
- Skin Absorption:** Elemental mercury can enter the body through the skin and significantly increase biological levels.



Health Effects

- Short-term health effects:** accumulation in liver, kidney, brain, and blood. Inhalation of mercury vapor may cause headaches, salivation, metallic taste in the mouth, chills, cough, fever, tremors, abdominal cramps, diarrhea, nausea, vomiting, tightness in the chest, difficulty breathing, fatigue, or lung irritation. Symptoms may be delayed in onset for a number of hours. Severe acute effects may include severe gastrointestinal damage, cardiovascular collapse, or kidney failure, all of which could be fatal.
- Known long-term health effects:** central nervous system effects, kidney damage, and birth defects. Elimination from the brain is slow, resulting in nerve tissue accumulation. Nervous system chronic effects include: increased excitability, mental instability, fine tremors of the hands and feet, and personality changes. Also, chronic exposure causes kidney damage that produces increased protein in the urine and may result in kidney failure at a high dose exposure. Symptoms observed in children whose mothers experienced mild, chronic mercury exposure during pregnancy include delayed developmental milestones, altered muscle tone - tendon reflexes, and depressed intelligence. Mercury related birth defects include neurologic damage from methyl mercury. Chronic mercury exposure in children can cause a severe form of poisoning termed acrodynia which causes pain in the extremities, pinkness and peeling of the hands, feet and nose, irritability, sweating, rapid heartbeat and loss of mobility.
- Potential human health effects:** genetic damage is suspected in developing fetuses as a result of a mother's exposure to methyl mercury.



Brownfields Program Staff

Brownfields Bulletin is published quarterly by the Indiana Department of Environmental Management to inform local government officials, business representatives, and interest groups about brownfields redevelopment initiatives and success stories from within and beyond the state. A brownfield site is an industrial or commercial property that is abandoned, inactive or underutilized due to actual or perceived environmental contamination. IDEM's overall mission is to make Indiana a cleaner, healthier place to live. IDEM's brownfields initiative helps communities remove barriers for sustainable growth.

Please contact Dan Chesterson of the IDEM Brownfields Program to inform IDEM of address changes, to be added or deleted from the mailing list or e-mail list serve, or to share your comments and ideas about this publication.

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IDEM's toll-free number: (800) 451-6027, press 0 and ask for a person by name or number, or dial direct.

Who Can Help

Technical and educational assistance

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Brownfields Program Staff (listed top right)
100 N. Senate Ave., Suite 1101
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Indianapolis, IN 46206-6015
www.IN.gov/idem/land/brownfields

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